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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-751

VINCENT PACELLI, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Vincent Pacilli, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 24, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported at 521 F. 2d 135. A copy appears as Appendix B herein.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 24, 1975. A timely petition for

rehearing was denied on September 22, 1975. On October 15, 1975, Mr. Justice Marshall extended the time to file this petition to and including November 21, 1975. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. *Whether, in a federal criminal prosecution for conspiracy resulting in death, where the only evidence connecting defendant to the crime is the testimony of an immunized alleged co-conspirator who is shown by uncontradicted evidence to be a drug addict, a pathological liar, and seriously mentally ill, it is fundamentally unfair to deny a defense motion to psychiatrically examine the witness.*

2. *Whether, in a prosecution based on the uncorroborated testimony of an alleged co-conspirator, it is fundamentally unfair to exclude any and all expert psychiatric testimony, based upon observation of the witness and study of medical, biographical, prison and probation records, that the Government witness is (a) a drug addict, (b) a pathological liar, (c) a psychopath, (d) unable to distinguish reality, (e) unable to respect an oath, (f) seriously ill and in need of medical treatment.*

STATEMENT OF THE CASE

Petitioner was convicted on both counts of a two-count indictment, in a jury trial before Judge Charles Stewart in the Southern District of New York, on January 31, 1975. Count 1 charged that, in violation of 18 U.S.C. § 241, petitioner and unindicted co-conspirator Barry Lipsky conspired to deprive a prospective federal witness of her right to testify, and that the conspiracy caused her death. Count 2 alleged that petitioner impeded a federal witness, contrary to

18 U.S.C. § 1503, by killing her. Judge Stewart imposed a life sentence on Count 1, to be served consecutive to a thirty-five year sentence petitioner is presently serving for violations of the narcotics laws. A five year concurrent sentence was imposed on the second count.

The Government established without dispute that an unsuccessful effort was made to serve a subpoena on Patsy Parks on February 3, 1972, to testify in a federal narcotics prosecution of petitioner, petitioner's wife, and two other defendants who were friends and neighbors of Parks. Informed by her roommate about the marshall's effort to serve her, Parks discussed the matter with friends, and suggested she should leave town (T. 150, 156).* She did not want to testify because, she said, she had already been an F.B.I. informer (T. 139) and was afraid even her boyfriend might kill her if he knew (T. 150).

The night of February 3rd, she went looking for petitioner, to seek his advice, although she hardly knew him (T. 163), had seen him only once or twice. In the course of that quest, she met Barry Lipsky in a nightclub.

The next day, Parks' body was found in Long Island, New York. Her throat had been cut, she had been stabbed nine times (T. 1004) and her body had been burned by gasoline flames (T. 998).

Lipsky, who had confessed some implication in the murder to Nassau County authorities, was originally charged with first degree murder by the State. Through intervention of federal authorities, however, Lipsky was ultimately permitted to plead quilty to manslaughter and received a sentence of 0 to

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* Reference is to the trial transcript.

20 years. In addition, in return for his cooperation, the federal authorities granted him informal immunity from federal prosecution for the murder, numerous narcotics offenses, and various other crimes.

As part of his deal with the Government, Lipsky testified below. He swore that petitioner had actually orchestrated the murder, wielded the knife and poured gasoline over the victim's body. According to Lipsky, his role has been limited to buying the gasoline, luring Parks into the car, lighting the match to the gasoline, driving the car, and helping to dispose of the evidence.

The defense theory was that Barry Lipsky alone, or in league with someone other than petitioner, had murdered Parks. It was thus an attack on the credibility of Lipsky's testimony which implicated petitioner. According to the defense, petitioner had no motive to kill Parks, as proved by her grand jury testimony, which did not implicate him in any crime (T. 74), and the fact that Parks hardly know petitioner (T. 163). The defense also relied on serious inconsistencies in Lipsky's testimony, inherent improbabilities, and external contradictions. The thrust of the defense, however, was that Lipsky was crazy, and had a unique combination of perverted drives, needs and propensities, which would make it likely that he would commit such a bizarre murder himself, then try to pin responsibility on someone else.

On cross-examination, the defense sought to elicit from Lipsky that (1) in a previous prosecution of petitioner for violation of the narcotics laws, Lipsky had perjuriously implicated petitioner in a narcotics transaction in which petitioner had played no part, (2) in two previous prosecutions of petitioner for violations of the narcotics laws, Lipsky had,

with full knowledge of the prosecutor, perjuriously denied any promises or understandings with the Government, when in fact he had been granted immunity by the very prosecutor who elicited his perjury; (3) one month before Patsy Parks was murdered and burned, Lipsky suggested to a friend of his that two witnesses against the friend be "burned." The trial judge precluded all these inquiries.

The precluded cross-examination was complained of on appeal. The court, below,holding that all the rulings were discretionary, affirmed.

Motion for Psychiatric Examination

Prior to trial, petitioner moved for a psychiatric examination of Lipsky, the Government's witness (A. 13)*. A related motion to disqualify Lipsky was also made (A. 57). Alleging serious reasons to doubt Lipsky's mental competence to be a witness and, in any event, that a psychiatric examination would disclose substantial evidence bearing upon Lipsky's credibility, petitioner sought permission to have Lipsky examined by a psychiatrist approved by the court. In support of the motion, petitioner proferred numerous documents:

a. Transcripts of conversations in 1972 between Lipsky's attorney and an Assistant United States Attorney, wherein they agreed to Lipsky's being a Government witness, then discussed his mental condition and competence as a witness. Therein, Lipsky's attorney said he intended to have Lipsky examined by a "whole battery of psychologists," as there was "something wrong with him." Even if not "beastly insane," he is "capable of going crazy as hell. . . . If he's gonna be any good, he's got to be competent." The prosecutor agreed with

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* Reference is to the Appendix in the Court of Appeals.

these observations, acknowledging that the prosecution "can't use a screwball." The attorney observed that Lipsky was becoming "edgy". The prosecutor agreed, saying "It's more noticeable." Both expressed concern for Lipsky's "emotional stability." (A. 15)

b. An affidavit filed by Lipsky's attorney in state court, more than six months after the preceding conversations, wherein the attorney swore that Lipsky was mentally incompetent to stand trial, being unable to communicate with his attorney. The affidavit recited, *inter alia*, that, before his arrest, Lipsky had fired a gun into a television set to silence the announcer and had thrown two scales into the Atlantic because they refused to reveal that he had lost weight (A. 18).

c. Lipsky's sworn testimony in prior proceedings wherein he had admitted consulting a psychiatrist, banging his head against a wall in anger, committing perjury before a federal grand jury in Florida and in two previous prosecutions against this petitioner, being a regular user of cocaine and other drugs since 1967, being an afficianado of horror programs, even to the extent of adopting as an alias the name of one of his favorite horror program characters (A. 16).

d. Letters by Lipsky's attorney to various people concerning Lipsky's sanity, *e.g.*, to the jail warden asking help for "this mentally disturbed man in keeping what sanity he has" (A. 25), to the state prosecutor, noting Lipsky is "mentally deteriorating very rapidly" and warning that Lipsky would be useless if not competent (A. 27).

e. A letter from Lipsky to his sister wherein Lipsky says, "I am completely without emotional feelings that most 'straight' people have. . . . I am a violent, vindictive, warped-minded cynic, of a magnitude that you have absolutely no

conception of." Noting that he was then (July, 1972) being incarcerated with "'nuts' or psychos", Lipsky told his sister, "I am probably closer to where I actually belong than ever before." He continued, however, that "the things these lunatics do and say only amuses me and I wish I could . . . go near them to 'steam them up' and laugh at them. . . ." (A. 30)

Petitioner's pre-trial motion, which was denied, was renewed at trail, during cross-examination of Lipsky. In addition to the evidence of mental illness adduced pre-trial, petitioner had elicited the further facts that Lipsky had put a pistol to his brother's head to win a fight (A. 353), struck his hand against walls in anger at least a dozen times (A. 356), had frequent temper tantrums (A. 356). Lipsky also used numerous aliases from horror programs, *e.g.* "Mr. Graves," "Mr. Holmes," "Morris Stroud," "Wart" (A. 410), amused himself by making faces at the television set and making gruesome faces and noises at children to scare them (A. 681). It was also proved that Lipsky signs cards and letters with a claw (Def. Ex. P).

Admitting that his mental condition deteriorated rapidly since he was jailed for the murder in March, 1972 (A. 359, 365), Lipsky also acknowledged taking cocaine, marijuana, hashish, barbituates and alcohol, in various combinations, from 1967 until 1972 (A. 392, 400). Indeed, he admitted taking barbituates during petitioner's trial (A. 264), and banging his hand against the wall and crying in the witness room (A. 398).

Lipsky also admitted to a perverse pattern of dishonesty, including stealing books from a classmate (A. 399), stealing money from his mother and forging checks on her account (A. 279), a large number of bizarre swindles, and a nearly

unbroken record of lies and perjuries in legal proceedings since 1970.

When asked what the oath meant to him, rather than referring to any obligations, Lipsky said, "You sit here and swear to tell the truth." (A. 423). He said he did not know the meaning of "morally" (A. 362).

Petitioner also informed the trial judge that he had a psychiatrist in the courtroom who had suggested various lines of cross-examination which the court had precluded, *e.g.*, about Lipsky's admitted nightmares, which were relevant to psychiatric evaluation of Lipsky's competence and credibility. Petitioner also informed the court that the psychiatrist had tentatively diagnosed Lipsky as a "psychopath, a pathological liar, an egomaniac." The court again denied the motion, for the inexplicable reason, "[Y]ou have not made out a good enough case." (A. 630)

On appeal, the Court of Appeals relegated this issue to a footnote, affirming the denial as within the trial judge's discretion (App. p. 5096, n. 4).

Wholesale Exclusion of Psychiatric Testimony

Thwarted in its efforts at a psychiatric examination, the defense offered the testimony of a distinguished psychiatrist, one normally employed as an expert witness by the Department of Justice.[1] The psychiatrist, Dr. Abrahamsen, based his analysis on a three-day observation of Lipsky as he testified in the courtroom (A. 749), studying a transcript of that

[1]See *United States* v. *Baird*, 414 F. 2d 700 (2d Cir. 1969); *United States* v. *Weiser*, 428 f. 2d 932 (2d Cir. 1969); *United States* v. *Levy*, 449 F. 2d 769 (2d Cir. 1971).

testimony (A. 745), numerous letters by Lipsky (A. 743), medical records (A. 31, 35, 77), probation reports (A. 63), medical and family histories (A. 79). On the basis of all these data, Dr. Abrahamsen testified, in an offer of proof, that Lipsky was "mentally ill" (A. 749), a "psychopathic personality" (A. 751), a "very sick man" (A. 759), "mentally diseased" (A. 821), with what psychiatrists refer to as a "character disorder" (A. 823). Lipsky shares with psychotics (A. 757) an inability to distinguish reality (A 751), is abnormally self-serving, highly egocentric and narcissistic; truth to him is always secondary (A. 751, 1142). Indeed, his reality, i.e. his "truth" is simply what seems to serve his interests (A. 752, 759). He cannot tell the truth unless it perfectly concides with his own interests, as he perceives them (A. 759), and he has a distorted perception of self-interest (A 761). Lipsky is a pathological liar (A. 791), violent, vindictive, preoccupied with horror, and is unable to accept blame for his own conduct. On the contrary, he "blames everyone else" for what he has done (A. 762).

The psychiatrist also interpreted jail records of drug dosages, which records were otherwise incomprehensible. The records indicated very strong recent dosages of Valium and Dalmane (A. 789), establishing present drug addiction and mental illness (A. 789-90, 807-8).

The trial judge ruled out all the foregoing testimony, even that concerning drug dosages and drug dependency. The Court of Appeals affirmed, holding the matter to be one of discretion.

REASONS FOR GRANTING THE WRIT

1. *The decision below is grievously wrong, anachronistic, and fundamentally unfair in matters vital to the integrity of the federal criminal process.*

In prosecuting petitioner for what was essentially a murder upon the uncorroborated testimony of Barry Lipsky, the Federal Government impinged upon the clear policy of the State of New York, which has the core concern for crimes of murder, for that State holds unequivocally that no conviction can be obtained upon such testimony. *People* v. *Hayes*, 325 N.Y.S. 2d 815 (1971).[2] Even where a federal prosecution does not so clearly clash with state policy, however, a prosecution based on the testimony of an alleged accomplice is fraught with possible injustice and any claimed errors must be scrutinized with great care. *United States* v. *Persico*, 305 F. 2d 534 (2d Cir. 1962). *Cf.*, *Glasser* v. *United States*, 315 U.S. 60, 67 (1942). The court below, however, abdicated its responsibilities and set back the course of justice at least half a century.

A. The Right to a Psychiatric Examination

There is no doubt of the court's authority to order a mental examination of a prosecution witness, *Carrado* v. *United States*, 210 F. 2d 712, 721 (D.C. Cir. 1954), and this authority becomes a duty whenever there is reasonable doubt as to the competence or the credibility of the witness. *State* v. *Butler*, 27 N.J. 560, 143 A. 2d 530 (1958); *United States* v. *Butler*, 481 F. 2d 531 (D.C. Cir. 1973); *United States* v. *Benn*, 476 F. 2d 1127, 1130 (D.C. Cir. 1973).

More than a quarter century ago, Wigmore called for the routine psychiatric examination of prosecution witnesses where, by reason of dependency on the prosecution or the nature of the charge, the claims are inherently suspect

[2] Petitioner has never been prosecuted for a state offense.

3 Wigmore, Evidence § 924(a) (3d ed. 1940). Scholarly and judicial authorities are clearly in accord. See Conrad, *Mental Examination of Witnesses*, 11 Syracuse L. Rev. 149 (1960); Weihofen, *Testimonial Competence and Credibility*, 34 Geo. Wash. L. Rev. 53, 75 (1965); Slovenko, *Witnesses, Psychiatry, and the Credibility of Testimony*, 19 U. of Fla. L. Rev. 330 (1958); Comment, 59 Yale L.J. 1324 (1950). While no one claims that a defendant has a right in every case to have the witness against him examined, there is plainly such a right where some evidence of mental abnormality exists and the charge is a very serious one, *State* v. *Butler, supra, Taborsky* v. *State*, 116 A. 2d 433 (Conn. 1955), or the witness is a heavy part of the prosecution's case. *United States* v. *Butler, supra*; Comment, 59 Yale L. J. 1324 (1954).

The evidence submitted below in support of petitioner's motion was not only overwhelming proof of psychological abnormality, if not insanity, it was also incontrovertible proof of prolonged narcotics use. Lipsky admitted that in addition to other drugs, he snorted cocaine "on almost a daily basis" beginning in 1967 (A. 393). He sometimes took cocaine twenty times a day (A. 395). Citing medical sources, the District of Columbia Circuit, in *Hansford* v. *United States*, 365 F. 2d 920, 922 (D.C. Cir. 1966), recently observed that:

> "Current medical knowledge indicates that use of narcotics often produces a psychological and physiological reaction known as an acute brain syndrome, which is a 'basic mental condition characteristic of diffuse impairment of brain tissue function.' The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual func-

> tions including comprehension, calculation, knowledge and learning, impairment of judgment; and lability and shallowness of affect."

As to cocaine users in particular, it has been noted that:

> Prolonged and heavy cocaine use can produce severe psychological and physiological effects. One frequent psychological result is hallucinations. In some cases, prolonged use causes paranoid delusions. Some commentators claim that in these states of hyperexcitement and paranoia, the cocaine user is extremely dangerous and potentially violent. McLaughlin, *Cocaine: The History and Regulation of a Dangerous Drug,* 58 Cornell L. Q. 537, 551 (1973).

Still, as the court noted in *Hansford, supra,* 365 F. 2d at 923:

> "The effects of narcotic use will vary depending on the amount of drugs taken, the degree of tolerance developed by the individual, and the idiosyncratic reaction of the person to the drugs. For this very reason, only by a hearing can it be determined whether any particular [person] is incompetent because of his use of drugs."

The defense was denied that hearing, and denied access or inquiry into the relationship of Lipsky's drug usage to his other mental disorders. In refusing the reguested examination, the court not only denied the defense access to evidence relevant to the jury's assessment of credibility, it neglected its solemn duty to determine the testimonial competence of witnesses. *United States* v. *Crosby,* 462 F. 2d 1201 (D.C. Cir. 1972). Not only was Lipsky incontrovertibly proved to be a mentally ill drug addict, he was a persistent perjurer who

had never been and did not expect to be prosecuted for his perjury, even that directed against the petitioner in prior prosecutions. There was, therefore, no basis whatsoever for believing that Lipsky was a competent witness. He utterly and totally lacked "a sense of moral responsibility . . . to speak the truth", which is a requisite of testimonial competence. 2 Wigmore, Evidence § 495 (3d ed. 1940).

Apart from Lipsky's incompetence, however, his mind was a storehouse of information relating to his credibility. Since he was literally a captive of the Government, the Government had exclusive dominion over this evidence. In denying the defense access to such evidence, the court effectively suppressed evidence and made a fair trial impossible. *Cf. Washington* v. *Texas,* 388 U.S. 14, 19 (1967); *Giles* v. *Maryland,* 386 U.S. 66, 99 (concurring opinion of Mr. Justice Fortas) (1967).

B. The Expert's Testimony

Petitioner offered a highly qualified, concededly expert psychiatrist to testify concerning Lipsky's competence and credibility. The adequacy of the data upon which the opinion was based was neither disputed nor disputable. The sole reason for excluding the doctor's testimony was the preposterous assertion that it would be "of no use to the jury" (A. 845).

The admissibility of medical opinion relating to testimonial competence or credibility has been clear for a quarter century. *United States* v. *Hiss,* 88 F. Supp. 559 (SDNY 1950), *affd.* 185 F. 2d 822 (2d Cir. 1950), *cert. den.* 340 U.S. 948 (1951); *Taborsky* v. *State,* 95 A. 2d 59 (Conn. 1953); *United States* v. *Partin,* 493 F. 2d 750 (5th Cir. 1974); McCormick, Evidence § 45, at 95 (2d ed. 1970). Indeed, exclusion of evi-

dence similar to that offered below was held reversible error more than half a century ago. *Ellarson* v. *Ellarson*, 198 App. Div. 103, 190 N.Y.S. 6(1921); *State* v. *Pryor*, 74 Wash. 121, 132 P. 874 (1913).

The literature of psychiatry makes clear that a jury is particularly needful of medical guidance in assessing the credibility of a psychopathic liar like Lipsky. As if writing about Lipsky, Henry Weihofen said of psychopathic personality (sociopathy):

> It can have a material effect on credibility. Although capacity to observe and recollect is apparently unimpaired, the sense of moral responsibility to narrate truthfully may be affected. This may render the witness careless with the truth, impulsive, and undependable. Because he is so utterly devoid of any sense of guilt, he feels justified in telling all sorts of lies to escape the consequences of his acts.
>
> The sociopath may harbor unconscious hostilities that lead to false accusations of biased testimony. He may crave the publicity that his accusations give him or, driven by unconscious motives, may indulge in repetitious lying which is wholly irrational and without any discernable end. He may appear normal, mild-mannered, and intelligent. His lies, indeed, are often told with more conviction than normal persons show. Even when his lying is exposed, he is able to make quick adjustments and thoroughly mislead the layman. Even the psychiatric expert has the greatest difficulty in recognizing the existence of the condition or assessing the person's credibility." Weihofen, *Testimonial Competence and Credibility*, 34 Geo. Wash. L. Rev. 53, 86 (1965).

Accord, Davidson, *Testimonial Capacity*, 39 B.U.L. Rev. 172, 179 (1959), 1 American Handbook of Psychiatry 581-3

(Arieti, ed. 1959), Redlich and Freedman, Theory and Practice of Psychiatry 392 (1966).

The jury may of course disregard an expert's testimony, or it may accept the testimony but believe the witness anyway. It is simply outrageous, however, to hold that the jury may not *hear* the expert, and consequently that the Government may convict a defendant of murder and sentence him to life on the testimony of a psychopath while denying the defense a right to have the jury hear its medical evidence.

Where, as here, the heart of the defense is that the witness himself was the murderer, and that both the crime and the testimony laying the crime on the defendant were the products of a disordered mind, exclusion of the doctor's testimony denies the petitioner the right to put on a defense. *Washington* v. *Texas*, 388 U.S. 14, 19 (1967); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Webb* v. *Texas*, 409 U.S. 95 (1972). *Cf. Davis* v. *Alaska*, 415 U.S. 315 (1974).

Mental disorders are so peculiarly the subject of expertise that lay opinion on the matter is often denigrated or even excluded. The jury in the present case undoubtedly rejected petitioner's defense because they heard no medical evidence to back it up. They were entitled to assume, and surely did assume, that if there was anything to petitioner's claim that Lipsky was a crazy murderer, the defense could have found a psychiatrist to support it. By excluding the evidence, therefore, the court virtually directed a verdict of guilty. Conferring upon a trial judge the unfettered "discretion" to reject such evidence is tantamount to repealing the right to trial by jury.

2. *The Decision Below is in Conflict With Other Circuits*

In holding that a psychiatric examination of the prosecution witness is discretionary, even where the witness is a proven drug addict and the witness is uncorroborated, the decision below conflicts with decisions of the Court of Appeals for the District of Columbia. See *United States* v. *Butler,* 481 F. 2d 531 (1973).

In rejecting expert evidence that the prosecution witness is mentally ill, a pathological liar, and a drug addict, the decision below is in conflict with the Fifth Circuit, *United States* v. *Partin,* 493 F. 2d 750 (1974), and the District of Columbia Circuit, *United States* v. *Crosby,* 462 F. 2d 1201 (1972).

3. *The Decision Below Brings the Administration of Federal Criminal Justice into Disrepute.*

Although from time to time reversing egregious State Court decisions, this Court has recently manifested a willingness to permit the United States Courts of Appeal to become the courts of last resort in criminal cases. The decision below is the sequela of such a tendency. The court below felt free to abdicate its responsibilities under the rubric of trial judge discretion. The trial judge, in the alleged exercise of that discretion, refused the defense access to vital evidence—a psychiatric examination—and kept from the jury other vital evidence—the expert's diagnosis—and thus deprived petitioner of a meaningful jury trial, all in a case consisting of the uncorroborated testimony of an immunized accomplice who admittedly committed perjury as a Government witness in two prior prosecutions of this petitioner. The citizenry can simply have no faith in such a process. Justice must not only be fair,

it must appear to be fair. *Offut* v. *United States,* 348 U.S. 11 (1954).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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